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JPL:AK
F.#2008R01056

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March 12, 2012

Via ECF and Hand

Honorable Eric N. Vitaliano
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Abdel Hameed Shehadeh
Criminal Docket No. 10-1020 (ENV)

Dear Judge Vitaliano:

The government submits this letter to notify the Court and the defendant of evidence that it seeks to admit at trial as direct evidence of the charged offenses or, alternatively, pursuant to Rule 404(b) of the Federal Rules of Evidence as evidence of the defendant's motive, intent, preparation and planning to join a jihadist fighting group.

I. Offense Background

On December 23, 2010, the defendant was charged in a three-count indictment with making false statements in a matter involving international terrorism, in violation of 18 U.S.C. § Section 1001(a). The government will prove at trial that the defendant attempted to travel overseas to join a jihadist fighting group and made false statements to federal law enforcement authorities in connection therewith.

A. The Defendant's False Statements to the FBI

At trial, the government will prove that on June 13, 2008, the defendant arrived at JFK Airport to board a flight to Pakistan. During an interview with federal law enforcement agents prior to boarding his flight, the defendant claimed that he was traveling to Pakistan to attend a madrasa.¹ The defendant was allowed to board the flight, however, upon arriving in Islamabad, Pakistani officials refused to admit the defendant

¹ A madrasa is an Islamic school.

into Pakistan. The defendant returned to the United States on June 15, 2008.

After returning from this trip, the defendant met with federal law enforcement agents on July 16, 2008 in Staten Island, New York. The defendant stated that he had traveled to Pakistan to visit an Islamic University in Islamabad and to attend the engagement party of a friend in Lahore, but he did not know the full name of his friend or have any contact information for him.

Finally, on February 10, 2009, the defendant again met in Staten Island, New York with federal law enforcement agents. During this meeting, the defendant reiterated that he had traveled to Pakistan to attend a madrasa for religious purposes, and denied that he had traveled to Pakistan to receive military-type training or join a jihadist terrorist group. He further stated that he had never told anyone that he intended to receive training, wage jihad or fight in Afghanistan.

B. The Government's Direct Evidence at Trial

The government will prove at trial that (1) the defendant lied to federal law enforcement authorities on June 13, 2008, July 16, 2008 and February 10, 2009, by claiming, inter alia, that he had traveled to Pakistan to attend an Islamic University and a wedding; (2) the defendant's true purpose for traveling to Pakistan was to join a jihadist fighting group; and (3) the defendant told others that the purpose of his trip was to join a jihadist fighting group.

The government's evidence at trial will include testimony from two witnesses associated with the defendant, Witness #1 and Witness #2, that the defendant's true purpose in traveling to Pakistan was to join a jihadist fighting group. Additionally, the government will introduce the defendant's admissions to the FBI that he traveled to Pakistan in order to join a jihadist fighting group.² The defendant's admissions include the following: (1) if he had been admitted to Pakistan, he "100 percent" would have traveled to the North of Pakistan because he wanted to see the different jihadist groups, including the Taliban; (2) without a doubt, he would have joined the Taliban; (3) with a jihadist group, the defendant expected to

² Several of the defendant's admissions were made after he was arrested on October 22, 2010, and waived his Miranda rights. On February 16, 2012, the Court held a hearing on the defendant's motion to suppress his post-arrest statements. The Court has reserved ruling on the defendant's motion.

receive training in "guerrilla warfare" and "bomb-making"; and (4) the defendant considered al-Qaeda and the Taliban to be "one and the same."

II. Description of the Evidence the Government Seeks to Admit As Direct Evidence or Pursuant to Fed. R. Evid. 404(b)

The defendant is charged with lying to federal law enforcement authorities about his true purpose for traveling to Pakistan: to join a jihadist fighting group. The government therefore requests permission to introduce the following evidence at trial as direct evidence of the charged offenses or, alternatively, pursuant to Rule 404(b), to prove that the defendant's motive and intent for traveling to Pakistan was to join a jihadist fighting group, and to prove the defendant's ongoing planning and preparation to join such a group. See Fed. R. Evid. 404(b).

The defendant has already received notice of all of the evidence described below, as he has been provided with this evidence in Rule 16 discovery, or has otherwise been alerted to the expected testimony of the government's witnesses as set forth in the October 21, 2010 complaint.

A. Defendant's Pro-Jihadist Online Activities

The government seeks to introduce evidence that the defendant was the creator and administrator of multiple web sites which advocated violent jihad against the West. These web sites included www.sunnah101.com, www.civiljihad.com and www.mymakkah.com. This evidence will further establish the defendant's motive and intent to wage violent jihad.

1. Defendant's Administration of Several Pro-Jihadist Websites

The government will introduce the defendant's admissions, during a meeting with the FBI on October 20, 2008, that (1) he was the owner and administrator of the web sites www.civiljihad.com and www.mymakkah.com; (2) www.civiljihad.com was a web site designed to mirror and reformat the teachings of Awlaki; and (3) the defendant posted video recordings of al-Qaeda leader Ayman al-Zawahiri and al-Qaeda member Adam Gadahn on www.mymakkah.com. The government will also introduce business records establishing that the defendant was the administrator of these websites.

2. Screen Shots Captured from
Defendant's Pro-Jihadist Websites

The government will introduce screen shots capturing the defendant's public pro-jihadist internet postings, both before and after his trip to Pakistan in June 2008. These screen shots are largely described in the October 21, 2010 complaint filed in this matter (see Docket 10-CR-1020 (ENV), Entry 1, Complaint at ¶¶ 7-14), and include: (1) a video posted by the defendant of Osama Bin Laden, titled: "To the Peoples of the West"; (2) a hyperlink posted by the defendant to the web page www.anwar-alawlaki.com; (3) a video recording posted by the defendant titled: "Benefits of Jihad in Our Times"; (4) a "jihad" section of a website administered by the defendant, that contained, among other things, a speech by Zawahiri, an audio recording of Awlaki reciting a book on jihad entitled "Mashari al Ashwaq," and a montage of still images of jihadist fighters under the heading, "What is the least we can do?"; and (5) a posting by the defendant on the website www.revolutionmuslim.com.³

B. Evidence Seized From the
Defendant's New York Computers⁴

1. Consent Search of Desktop Computer

On April 16, 2009, the FBI executed a consent search of the defendant's home computer in Staten Island, an HP Pavilion desktop computer.⁵ Forensic analysis of the hard drive of the desktop computer revealed Google searches on or before June 2, 2008 for the following words and phrases:

al qaeda
baitullah mehsud
bin laden
fata
south waziristan pakistan
taliban

³ Revolution Muslim was a radical group based in New York that had expressed its agreement with the ideologies of al-Qaeda and other terrorist organizations.

⁴ The information obtained pursuant to criminal search warrants executed on the defendant's New York and Hawaii computers was made available for the defendant's review on March 9, 2012.

⁵ This computer was also used by the defendant's family members.

Evan Kohlmann is expected to testify at trial that South Waziristan, Pakistan is a Taliban stronghold located in the "FATA," or Federally Administered Tribal Areas, of Northwest Pakistan. Additionally, Baitullah Mehsud was a leading militant leader of the Taliban in Waziristan, Pakistan who was killed on August 5, 2009.

Forensic analysis of the hard drive of the computer also revealed Google searches on or before May 30, 2008 for the following words and phrases:

sararogha
south waziristan
south waziristan pakistan
waziristan map

Evan Kohlmann is expected to testify at trial that Sararogha is a village in South Waziristan, Pakistan, that is a stronghold of the Taliban.

The government respectfully submits that the defendant's online research of al-Qaeda, the Taliban, and South Waziristan, Pakistan, including searches for a map of Waziristan, just days before his departure for Pakistan, provides powerful direct evidence that the defendant lied to the FBI regarding his purpose for traveling to Pakistan, and 404(b) evidence of the defendant's planning and preparation to join a jihadist fighting group in Pakistan.

2. Search Warrant Executed on
Mirror Image of Laptop Hard Drive

On February 8, 2012, the FBI executed a criminal search warrant on a mirror image of the hard drive of the defendant's Toshiba Satellite laptop computer. Forensic analysis of the hard drive of the laptop computer revealed a link on his computer, accessed on or before February 8, 2009, to a file entitled "44 Ways of Supporting Jihad.lnk." Evan Kohlmann is expected to testify at trial that "44 Ways of Supporting Jihad" is a sermon in which Anwar Al-Awlaki encourages others to fight violent jihad.

The government respectfully submits that the defendant's possession and access to this pro-jihadist lecture by Awlaki within months of returning from his trip to Pakistan, and prior to his attempted to travel to Somalia, constitutes additional electronic evidence that the defendant lied to the FBI regarding his purpose for traveling to Pakistan.

C. Defendant's Attempt To Join The U.S. Army

The government seeks to introduce evidence that on October 3, 2008, the defendant attempted to join the United States Army under false pretenses, and lied to an Army recruiter and federal law enforcement authorities in connection with his attempted enlistment. Specifically, the evidence will establish that the defendant sought to join the U.S. Army in order to be deployed to Iraq, at which time he intended to defect and join a jihadist fighting group in Iraq that was engaged in battle against U.S. troops. This evidence further proves the defendant's motive and intent for traveling to Pakistan: to join a jihadist fighting group engaged in battle against U.S. troops.

1. Defendant's False Statements to Army Recruiter

The government will introduce evidence that the defendant lied to an Army recruiter when he stated that he had only traveled outside of the United States on one occasion, to Israel, by failing to disclose that he had traveled to Pakistan and been denied entry by the Pakistani government. To corroborate his travel history, the defendant showed the recruiter an expired passport with an Israeli stamp. This passport did not contain the defendant's Pakistani visa.

2. Evidence of Alteration of Passport

The government will introduce evidence that on October 20, 2008, the defendant was interviewed by federal law enforcement authorities, at which time he stated that he had a problem with his Army enlistment because he had not disclosed his travel to Pakistan. When an FBI agent examined the defendant's passport, he observed, and the defendant confirmed, that he had ripped out the Pakistani visa for his June 13, 2008 travel.⁶

3. Defendant's False Statements to Witnesses 1 and 2

Witness #1 is expected to testify that the defendant informed Witness #1 that he attempted to join the Army as part of his jihad. The defendant stated that he hoped to be deployed to Iraq, at which time he would commit "treason" and fight United States soldiers. Witness #2 is expected to testify that he understood that the defendant intended to join the United States

⁶ During the execution of a search warrant at the defendant's Hawaii residence on October 22, 2010, the government recovered this mutilated passport. The government seeks to introduce this passport as evidence.

military for the purpose of waging jihad. When Witness #2 and the defendant discussed the defendant's enlistment, the defendant explained to Witness #2 that "war is deception." The defendant also discussed a hadith⁷ that focused on the use of deception during jihad.

D. Defendant's Email Communications with Anwar Al-Awlaki

The government seeks to introduce a series of emails exchanged between the defendant and Anwar Al-Awlaki, a now-deceased radical preacher and al-Qaeda member. Awlaki's website, www.anwar-alawlaki.com, advocated violent jihad against the United States and its allies.⁸ In these communications, which began on or before June 12, 2008 (the defendant departed for Pakistan on June 13, 2008), and continued through January 31, 2009, the defendant requested permission to study under Awlaki, offered to improve Awlaki's website, and asked Awlaki to post a fundraising box on his (Awlaki's) website for the "true muslims" of Palestine.

The defendant's communications with Awlaki, which took place before the defendant's trip to Pakistan, and continued for several months following his return from Pakistan, constitute important evidence of the defendant's support for violent jihad against the United States. This evidence tends to corroborate the government's other evidence concerning the defendant's motive for traveling to Pakistan.

E. Defendant's Attempt to Travel to Somalia

The government seeks to introduce evidence that on June 15, 2009, the defendant attempted to travel from Hawaii⁹ to Somalia, the operational headquarters of the violent terrorist

⁷ The hadith are narrations concerning the words and deeds of the Islamic prophet Muhammad.

⁸ At trial, the government intends to call expert witness Evan Kohlmann to testify as to the background and significance of certain terrorists and terrorist organizations, including Awlaki, whom the defendant either communicated with directly, or for whom the defendant expressed support through his online activities. The government will provide a report of Kohlmann's expected expert testimony, pursuant to Fed. R. Crim. P. 16(a)(1)(G).

⁹ The government will prove at trial that on or about April 14, 2009, the defendant traveled from New York to Hawaii.

organization Al-Shabaab.¹⁰ The defendant's attempt to travel to Somalia is powerful evidence of the defendant's continued intent and commitment to joining a jihadist fighting group.

Specifically, the government seeks to introduce evidence that on June 6, 2009, the defendant purchased an airline ticket to travel on June 15, 2009, from Maui to Dubai, via Denver, Colorado, and Washington, D.C. On or about June 14, 2009, FBI agents met with the defendant. He advised the agents that he had purchased tickets to fly the following day. The defendant then stated that his ultimate destination was Mogadishu, Somalia, and that he had also purchased tickets to fly from Dubai to Mogadishu, via Djibouti. The agents advised the defendant that he was placed on the "No Fly" list and would not be permitted to board his flight. The following day, the defendant went to the airport and was informed that he would not be allowed to board his flight.

III. Legal Analysis

Section 1001(a)(2) prohibits the making of "any materially false, fictitious or fraudulent statement or representation" to the executive branch of government. A defendant violates Section 1001(a)(2) by "(1) knowingly and willfully (2) ma[king] a statement, (3) which was false... (4) which was within the jurisdiction of an agency of the United States" and which was material. United States v. Ballistrea, 101 F.3d 827, 834 (2d Cir. 1996).

A. Direct Evidence

Evidence of uncharged criminal activity is not considered "other crimes" evidence under Rule 404(b) "if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000); see also United States v. Towne, 870 F.2d 880, 886 (2d Cir. 1989)(holding that evidence

¹⁰ Evan Kohlmann is expected to testify that Al-Shabaab, a U.S. State Department designated foreign terrorist organization and a close ally of al-Qaeda in East Africa, is currently engaged in a terrorist war against the Somali government. Al-Shabaab's goal is to overthrow the Somali government and establish Sharia, or Islamic law, in that country. Kohlmann will also testify that Al-Shabaab recruits Westerners to join its ranks through its own media wing, Al-Kataib.

of uncharged crimes is admissible when it is "inextricably intertwined" with the narrative of the charged offenses and is "necessary to complete the story of the crime on trial.").

Here, the defendant is charged with making false statements regarding his purpose for traveling to Pakistan, specifically, (1) that he traveled to Pakistan to attend a school and a wedding, and (2) that he did not travel to Pakistan in order to join a jihadist fighting group. Therefore, an element of the charged offenses that the government must prove at trial is that the defendant's true purpose and intent for traveling to Pakistan was to join a jihadist fighting group. Accordingly, evidence of the defendant's support for and interest in jihadist fighting groups, as discussed above, is admissible as necessary to complete the story of the crime on trial. This evidence is highly probative direct evidence of the defendant's true purpose for traveling to Pakistan, and proves that the defendant is guilty of the false statement charges against him.

B. 404(b) Evidence

The Court has broad discretion to admit "other act" evidence under Rule 404(b), see United States v. Myerson, 182 F.3d 153, 162 (2d Cir. 1994); United States v. Sappe, 898 F.2d 878, 880 (2d Cir. 1990), and should follow the "inclusionary" approach to "other act" evidence, see United States v. Guang, 511 F.3d 110, 121 (2d Cir. 2007); United States v. Harris, 733 F.2d 994, 1006 (2d Cir. 1984). Thus, evidence of a defendant's prior bad acts is admissible under Rule 404(b), subject to the limitations of Rule 403, if that evidence is offered for "any purpose other than to show a defendant's criminal propensity." United States v. Rouhani, 47 F.3d 539, 544 (2d Cir. 1995); see Guang, 511 F.3d at 121; United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994) (under Rule 404(b), evidence offered for a proper purpose should be admitted unless it is unfairly prejudicial); United States v. Mickens, 926 F.2d 1323, 1328 (2d Cir. 1991) (same); United States v. Colon, 880 F.2d 650, 656 (2d Cir. 1989) (same).

In deciding whether to admit evidence of uncharged crimes under Rule 404(b), the Court must: (i) determine whether admission of the evidence is offered for a proper purpose; (ii) determine whether the evidence is relevant to an issue in the case; (iii) determine whether or not the probative value of the evidence is substantially outweighed by the prejudicial impact; and (iv) give a limiting instruction if one is requested by the defense. See United States v. Huddleston, 485 U.S. 681, 691-92 (1988).

1. The Evidence Is Offered for a Proper Purpose

Rule 404(b) provides a non-exhaustive list of purposes for which evidence of other crimes may be admitted, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). In the instant case, the evidence identified above is offered for the proper purposes of motive, intent, preparation and planning.

Here, evidence of the defendant's pro-jihadist activities publicly posted on the internet, electronic evidence recovered from the defendant's New York computers, and evidence of the defendant's continuing pro-jihadist activities after he moved to Hawaii in April 2009, including his attempt to travel to Somalia, the operational headquarters for Al-Shabaab, all constitute direct evidence of the defendant's intent, motive, preparation and planning to fight jihad.

Similarly, evidence of the defendant's numerous email exchanges with Awlaki, and evidence that less than four months after attempting to enter Pakistan, the defendant attempted to join the U.S. Army under false pretenses in order to be deployed to Iraq and then defect to fight against U.S. troops, proves that the defendant's intent and motive for traveling to Pakistan was to join a jihadist fighting group. In addition, the fact that the defendant attempted to join the United States Army contradicts the defendant's purported reason for traveling to Pakistan, to attend school, which he presumably could have done outside of Pakistan.

2. The Evidence Is Relevant to an Issue in the Case

Rule 401 of the Federal Rules of Evidence requires that, to be admitted, evidence must be relevant. "Relevant" evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence of an uncharged crime, which is admitted for a proper purpose, is relevant so long as "the jury could reasonably find by a preponderance of the evidence that the act occurred and that the defendant committed the act." United States v. Ramirez, 894 F.2d 565, 569 (2d Cir. 1990) (citations omitted).

As set forth above, the evidence is offered for proper purposes, to prove that the defendant went to Pakistan to join a jihadist fighting group. Moreover, because the evidence takes

the form of the defendant's own statements, emails and web postings, forensic evidence seized from the defendant's computers, and testimony from witnesses with firsthand knowledge of the defendant's actions, it cannot be disputed that a jury could reasonably find that the defendant made the statements and committed the acts.

3. The Probative Value of the Evidence Is Not Substantially Outweighed by Any Prejudicial Impact

In this case, the danger of unfair prejudice does not outweigh the probative value of the proffered evidence. The fact that evidence is incriminating does not mean it is unfairly prejudicial. Rather, the touchstone for unfair prejudice is the extent to which the evidence creates a risk of conviction based on a propensity finding. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from the proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). Put another way, "the prejudice must be unfair in the sense that it could unduly inflame the passion of the jury, confuse the issues before the jury, or inappropriately lead the jury to convict on the basis of conduct not at issue in the trial." United States v. Quattrone, 441 F.3d 153, 186 (2d Cir. 2006); see United States v. Matera, 489 F.3d 115, 120 (2d Cir. 2007) (recognizing that "[w]hen a defendant engages in a criminal enterprise which includes very serious crimes," 404(b) evidence can "be of important probative value in proving the enterprise").

The defendant's online and in-person communications in support of jihad are not more serious than the conduct underlying the charges currently faced by the defendant: traveling to Pakistan to join a jihadist fighting group. See United States v. Williams, 205 F.3d 23, 33-34 (2d Cir. 2000) (Rule 403 analysis favors admission where uncharged crimes "did not involve conduct more serious than the charged crime[s] and the district court gave a proper limiting instruction"). The activities described above that the government seeks to introduce pursuant to Fed. R. Evid. 404(b) are no more serious than the expected testimony of Witness #1 and Witness #2, or the defendant's own admissions, that the defendant intended to travel to Pakistan to wage jihad against U.S. troops.

Additionally, the proof of the uncharged acts the government seeks to admit will come from many of the same witnesses who will testify against the defendant regarding the charged offenses, specifically Witness #1, Witness #2, and the

federal law enforcement agents who handled the investigation into the defendant's criminal conduct, together with a small amount of independent corroboration and the testimony of a computer forensics analyst. Where uncharged acts are no more serious than the charged offenses and are based on the same proof, there is little danger that any prejudice will flow from the admission of evidence of the uncharged offenses. See United States v. Mejia-Velez, 855 F. Supp. 607, 611 (E.D.N.Y. 1994) (Korman, J.) ("If the jury found these witnesses to be credible, the defendant[s] would be convicted even if the accomplices were not permitted to testify about [the uncharged crimes]."). Thus, this is not a situation where the tail of the uncharged crimes is "wagging the dog" of the charged ones. United States v. Ferrer-Cruz, 899 F.2d 135, 141 (1st Cir. 1990) (Torruella, J., dissenting). Rather, the uncharged acts are a limited and discrete way of explaining the defendant's true motive and intent for traveling to Pakistan, and his ongoing preparation and planning to wage jihad, without creating the risk of conviction based on inflammatory or extensive "other act" evidence. Thus, the Court should admit this evidence.

In sum, the probative value of the evidence of the uncharged crimes described below is not substantially outweighed by the resulting danger of unfair prejudice. Consequently, the Court should admit this evidence pursuant to Rule 404(b).

IV. Conclusion

For the reasons set forth above, the government respectfully moves to admit the above-described evidence as direct evidence of the charged offenses or, alternatively, pursuant to Rule 404(b) of the Federal Rules of Evidence as evidence of the defendant's motive, intent, preparation and planning to join a jihadist fighting group.

Respectfully submitted,

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